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No. 03-897

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NORTH CAROLINA PAYPHONE ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Marcus W. Trathen
Counsel of Record
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street Mall,
Suite 1600
Raleigh, N.C. 27601
(919) 839-0300

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REPLY BRIEF FOR PETITIONER

1. The Government has ignored Congress's express mandate "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). Rather than admit its mistake, which is killing off competition among payphone service providers ("PSPs") and leading to the widespread abandonment of payphone services to the detriment of the general public, the Government would prefer to rely on claims like "Congress in Section 276 did not explicitly forbid non-BOC LECs from discriminating." Gov't Br. at 8. One cannot read § 276 as a whole and reasonably conclude that Congress intended to permit a large class of local exchange carriers ("LECs")—indeed, some 1200 of them—to discriminate against independent PSPs. *See, e.g., United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (stating that the Court will look "to the purpose of the act" when the statutory words otherwise appear to lead to "absurd or futile results"); *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 455 (1989) (stating that it must be "remember[ed] that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning" and that it is "perfectly proper" to "look[] beyond the naked text for guidance" "when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention" (internal quotation marks and citation omitted)). In fact, the Government concedes that the FCC itself did not acquiesce to such an absurdity since the FCC in its payphone rulemaking proceeding "required ***all LECs*** to provide PSPs with payphone line service . . . at forward-looking, cost-based rates priced under the new services test." Gov't Br. at 5 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC

Rcd 20541, 20614 (1996) ("*First Payphone Order*") and 11 FCC Rcd 21233, 21308 (1996) ("*Reconsideration Order*")) (emphasis added). It is only in the order that was under review below (the "*Wisconsin Order*"), *see* Pet. App. 20a-60a, that the FCC, in a non-rulemaking proceeding, abruptly and without notice, did an about-face. There is no question but that the FCC's original determination that it possessed jurisdiction to reach the payphone access line rates of non-BOC LECs and prevent such discrimination is entitled to considerably more deference than the opposite construction the FCC has now put upon the exact same statutory language. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

And rather than address the D.C. Circuit's fabrication of an entirely new "intrastate plus" test that not only finds no support in this Court's decision in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), but is directly at odds with it, the Government suggests that the independent payphone industry simply does not merit this Court's attention because it is not important enough. *See* Gov't Br. at 16. Unfortunately, the Government not only misreads *AT&T*, but it misleads this Court with incorrect factual matter. The FCC report cited incorrectly classifies more than 114,000 payphone access lines in former GTE (non-BOC LEC) territories as being in Verizon (treated wholly as a BOC) territories.[1] The evidence below

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[1] In 2000, Bell Atlantic (a regional BOC comprised of individual BOCs specified in 47 U.S.C. § 153(4)(A)) merged with GTE (the largest non-BOC LEC) to form Verizon. The merger did not turn the former GTE non-BOC LECs into BOCs. *See* 47 U.S.C. § 153(4)(C) (an affiliate of a BOC that is not already a BOC is defined not be a BOC).

In the August 2001 *Trends in Telephone Service* report, the FCC noted that it was combining the Bell Atlantic and GTE payphone data into the RBOC territories column, but that explanatory footnote was dropped from later editions. *See* FCC, *Trends in Telephone Service* (Aug. 2001), at Table 8.5 n.1, *available at* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/

(continued...)

was that, as of 2001, approximately half of all payphone access lines in GTE territories were operated by independent PSPs, *see* J.A. 118, and, while today the ratio is clearly higher,[2] that evidence is sufficient to show that, as of first quarter 2003, there were approximately 158,199 payphone access lines operated by independent PSPs in non-BOC LEC territories, which is 28% of all independent PSP access lines.

The Government's facile claim that payphone deployment is dropping due to "ubiquitous cellular phone service," Gov't Br. at 17, is wholly unsupported but proves too much in any case. The payphones remaining in non-BOC LEC territories,

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[1](...continued)
trend801.pdf>.

The August 2003 *Trends in Telephone Service* report that the Government cites compiles data as of the first quarter of 2003. Verizon's website, however, contains payphone access line data for that quarter (as well as all of 2001, 2002, and 2003) which indicate that Verizon had 114,145 payphone access lines in former GTE territories (including non-BOC LEC territories in Pennsylvania and Virginia). *See* Verizon Summary, Switched Access Lines In-Service, *available at* <http://investor.verizon.com/business/xls/access_lines-4q-03.xls>. These data permit one to correct the misimpression given in the August 2003 *Trends* report as to the number of payphone lines in non-BOC LEC territories. Unfortunately, the Verizon data also illustrate the steady erosion of payphone access lines due to the FCC's decision to permit non-BOC LECs, such as the former GTE operating companies, to continue to discriminate against independent PSPs. This erosion is made even more manifest by an FCC report that shows that as recently as December 31, 1999, there were 221,882 payphone access lines in GTE territories, a drop of nearly 50% in just three years. *See* FCC, *Statistics of Communications Common Carriers* (Aug. 2000), at 27 (Table 2.6), *available at* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/SOCC/99socc.pdf>.

[2] The August 2003 *Trends in Telephone Service* report shows that 57% of all payphone lines in non-BOC LEC territories is operated by independent PSPs (without regard to the miscategorization of the lines in former GTE territories). See FCC, *Trends in Telephone Service* (Aug. 2003), at Table 7.5, *available at* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend803.pdf>.

which are generally more rural than BOC territories, *see* Gov't Br. at 15 (acknowledging that "many" non-BOC LECs "operate in rural areas"), and, therefore, are less likely to have "ubiquitous" cellular service, are, in many cases, serving as a lifeline service. The growth of cellular services was apparent even in 1996, *see* August 2003 *Trends in Telephone Service*, at Table 11.1, and it is incomprehensible that, against that backdrop, Congress would have mandated the FCC to "promote the widespread deployment of payphone services to the benefit of the general public," 47 U.S.C. § 276(b)(1), by permitting the FCC to hasten their demise (or, more benignly, but no less perniciously, standing aside to observe the slow death of an entire industry). If anything, the continuing decline in payphone services *heightens* the national importance of the issue before the Court.

2. Perhaps more troubling are the internal inconsistencies in the Government's Brief and the Government's misreading of *AT&T*. The Government argues that § 276 is embedded in a particular part of the Communications Act, Part III of Title II, that "regulate[s] the activities of BOCs—but not other LECs—in various ways," Gov't Br. at 14, and, therefore, fails to reach regulation of payphones in non-BOC LEC territories, *see id.* at 14-16. Yet the Government admits that "the 1996 Act gave the FCC new authority over the payphone industry generally," Gov't Br. at 3, and expressly states that § 276(b)(1)(B) "applies to *all LECs*," *id.* at 4 (emphasis added). There is, therefore, no question but that § 276 does apply to non-BOC LECs and not only to BOCs.[3] There is also no question but that § 276 reaches *intrastate* payphone line rates,

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[3] In this respect, § 276 is no different from §§ 251 and 252 which the Court dealt with in *AT&T*. As the Government states, *AT&T* dealt with the FCC's implementation of §§ 251 and 252, "which set forth various 'obligations of all local exchange carriers' and various 'additional obligations of incumbent local exchange carriers'—i.e., both BOCs and non-BOC LECs." Gov't Br. at 11.

which the court below held it did with respect to BOCs. *See New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (Pet. App. 12a); Govt's Br. at 8 (quoting opinion below).

From these premises, the reasoning and conclusion of *AT&T* apply directly to this case. The court below has fallen into the exact trap that plagued its sister Eighth Circuit in *AT&T*: The "fallacy" of the decision below, and the Government's opposition here, "is that it ignores the fact that § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *AT&T*, 525 U.S. at 380 (emphasis in original). Moreover, the Government acknowledges that § 276(c) grants unrestricted preemption authority to the FCC but fails to explain how this broad preemption authority can support the Government's constricted reading of the rest of the statute. *See* Gov't Br. at 3 (quoting 47 U.S.C. § 276(c)). And the "lack of parellelism" that the Government stumbles over, *see* Gov't Br. at 4, 11-12, is "adequately explained by the fact that [§ 276(b)(1(C)] specifically *requires* the Commission" to apply the new services test to BOCs whereas the lack of a similar requirement for non-BOC LECs is "not peculiar [in] that the mandated regulations should be specifically referenced, whereas the regulations *permitted* pursuant to the Commission's § 201(b) authority are not." *AT&T*, 525 U.S. at 384-85 (first emphasis in original, second emphasis added).

The interpretation of § 276 that NCPA is advocating does no harm to the delicacy of any federal-state relations. While the FCC would have authority to establish that payphone access line and usage rates be cost-based and in compliance with the new services test, the FCC would not, itself, be setting the rates, and this scheme would still leave to state commissions the task of determining, in the first instance, that the rates of non-BOC LECs comply with the federal requirements. *Cf. AT&T*, 525 U.S. at 384 ("The FCC's

prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.").

In these circumstances, it is plain that § 2(b) of the Act presents no jurisdictional hurdle to the FCC requiring non-BOC LECs to comply with the new services test, if the FCC were to exercise its discretion in the fashion that it has indicated it would. *See Wisconsin Order*, ¶ 42 (Pet. App. 45a-46a).

3. That Congress has provided for, and the FCC has implemented, a regime pursuant to which payphone service providers are "fairly compensated" for "each and every" completed call is no excuse for failing to fully implement § 276, especially where the basis for that regime, a fully and fairly functioning market, has not been ensured by the FCC. As the Government acknowledges, *see* Gov't Br. at 5 and 16, the fair compensation regime adopted by the FCC, in both BOC and non-BOC LEC areas, is a market-based mechanism, yet the FCC's refusal to prohibit discrimination in non-BOC LEC areas is preventing this mechanism from working. As the FCC recognized in its payphone orders, *see, e.g., First Payphone Order*, ¶¶ 14, 146, LECs have the incentive to discriminate against their primary competitors in the retail payphone business by charging above-market rates for payphone access lines. Because this is occurring, the free market envisioned by the FCC in its "fair compensation" regime cannot function, to the detriment of competitors who are being encouraged to move payphones to less costly areas to avoid the LEC-imposed price squeeze and to the detriment of consumers who are facing higher prices and fewer choices.

4. NCPA is not asking the Court to legislate or establish

policy. Congress has already done that in unmistakable terms. Instead, NCPA is asking the Court to review a court decision that permits a federal agency to thwart the policy established by Congress, to frustrate Congressional intent to have a comprehensive regulatory regime implemented, or to otherwise shirk its obligation to implement statutory grants of authority. However "minor" the viability of an entire industry may seem to the Government, Congress begged to differ, and it codified in § 276 its policy choice to "promote the widespread deployment of payphone services to the benefit of the general public." It is precisely because the Government would rather sweep under the rug such Congressionally-mandated "trifles" that this case presents an important federal question warranting this Court's review.

Conclusion

For the foregoing reasons, as well as those set forth in the petition itself, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Marcus W. Trathen
Counsel of Record
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street Mall,
Suite 1600
Raleigh, N.C. 27601
(919) 839-0300

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